

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHESTER R. JONES, JR. and DEPARTMENT OF THE ARMY,
ARMY AUDIT AGENCY, Falls Church, Va.

*Docket No. 95-2445; Submitted on the Record;
Issued June 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's disability causally related to his September 28, 1977 and August 15, 1983 employment injuries ended by September 18, 1994.

Appellant sustained employment injuries to his low back on September 28, 1977 when he was hit by a car, and on August 15, 1983 when he was helping to move furniture. Appellant underwent four surgeries on his low back: a posterior hemilaminectomy at L4-5 on November 8, 1980, a partial hemilaminectomy at L4-5 and L5-S1 with excision of a ruptured disc at L4-5 on January 25, 1983, a partial hemilaminectomy at L4-5 with excision of a herniated disc on October 31, 1983, and a lumbar laminectomy at L3-5 with L3-4 discectomy and open facet rhizotomies at L3-4, L4-5 and L5-S1 on November 7, 1984.

The Office of Workers' Compensation Programs accepted that appellant's surgeries were for the effects of his employment injuries, and paid appellant compensation for temporary total disability during his absences from work. Appellant retired on disability on September 1, 1984, but elected to receive compensation under the Federal Employees' Compensation Act in lieu of retirement benefits under the Civil Service Retirement Act. The Office then paid appellant compensation for temporary total disability from March 23, 1984 to July 31, 1990 and thereafter placed appellant on the periodic roll for continuing compensation.

By decision dated September 30, 1994, the Office terminated appellant's compensation effective September 18, 1994 on the basis that he was capable of performing his preinjury job. This decision was affirmed by an Office hearing representative in a January 26, 1995 decision, and on reconsideration on April 24, 1995.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

without establishing that the disability has ceased or that it is no longer related to the employment.¹

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective September 18, 1994.

The Office based its decision to terminate appellant's compensation on a December 19, 1991 report from Dr. Harvey H. Ammerman, appellant's attending neurosurgeon and the physician who performed appellant's first three back surgeries. In this report Dr. Ammerman diagnosed "Residuals of lumbar disc disease with multiple lumbar laminectomies (4), with residual radiculopathy right." In response to the Office's request to review an attached job description and opine whether appellant was able to perform the job of a supervisory management specialist, Dr. Ammerman stated, "The claimant is capable of performing the job as a supervisor management specialist based on this job description, as I understand it, this does not require any significant amount of bending or lifting and nothing heavy would have to be lifted under any circumstances. Within these parameters, he could do that position." This report indicates that appellant could perform the duties of the position he held when injured on August 15, 1983.² However, by the time the Office terminated appellant's compensation on September 18, 1994, Dr. Ammerman's December 19, 1991 report was almost three years old. As the passage of time had lessened the relevance of Dr. Ammerman's opinion on appellant's ability to work, the December 19, 1991 report was not a sufficient basis to terminate appellant's compensation on September 18, 1994.³

In addition, between the date of the Office's proposed termination of compensation on June 5, 1992 and the date of the Office's decision that terminated appellant's compensation, appellant submitted evidence that he was disabled. In a report dated July 26, 1993, Dr. Bruce J. Ammerman, a Board-certified neurosurgeon who is an associate of Dr. Harvey Ammerman, stated, "The patient continues disabled as even modest activity significantly exacerbates his lower back discomfort." Dr. Bruce Ammerman also examined appellant on September 17 and October 1, 1993, and did not indicate he could return to work. On July 5, 1994 Dr. V. Rao Mandava, a Board-certified anesthesiologist, began a series of epidural blocks for an acute exacerbation of lower back pain.

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

² When injured on August 15, 1983, appellant was working for the employing establishment as an equal employment specialist. Although the Office's inquiry and Dr. Ammerman's December 19, 1991 response refer to the position of supervisory personnel management specialist that appellant held at the time of his September 28, 1977 employment injury, the position description and physical requirements sent to and reviewed by Dr. Ammerman were for the correct position of equal employment specialist.

³ See *Anthony Pestana*, 39 ECAB 980 (1988) (The Board reversed a wage-earning capacity determination where the most recent thorough physical examination and evaluation was more than three years old); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (The Board found that work tolerance limitations almost two years old were not a sufficient basis for a determination of the employee's ability to perform a selected position.)

The Office cannot rely on Dr. Harvey Ammerman's December 19, 1991 report indicating that appellant could perform the duties of the job he held when injured to terminate appellant's compensation effective September 18, 1994, while ignoring the later reports supporting continuing disability, especially the July 26, 1993 report from Dr. Bruce Ammerman indicating appellant "continues disabled." The Office has not met its burden of proof.

The decisions of the Office of Workers' Compensation Programs dated April 24 and January 26, 1995 and September 30, 1994 are reversed.

Dated, Washington, D.C.
June 5, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member